> If anyone, for instance, had told me your jury instruction back in 1989, I wouldn't be here today.

[Sentencing Transcript, p. 176]

The Rejected Plea Overture

It is not disputed factually that a plea overture was made and rejected. As the district court noted in the 2255 decision from which this appeal is sought:

> [Trial counsel] asked Stahl [the prosecutor] to give a sentencing range for a possible plea agreement. Stahl suggested seven or eight years, and [trial counsel] replied that he did not think that Enright would accept such long sentence. The next day, [trial counsel] communicated the substance of his conversation with Stahl [the prosecutor] to Enright.

App. 12a; *Enright, supra*, 347 F.Supp.2d at 165. Enright rejected the offer because, based upon what his trial counsel had advised him, Enright thought he was not guilty of the crimes as charged:

> I told [trial counsel] that I did not want to plead guilty. I did so because I believed I was not guilty since I had never believed that PetroPlus was the taxpayer and thus I thought I was not

> guilty under the law as [trial counsel] had described it to me.

[Enright Affidavit, ¶8] Enright was, at the time of this plea discussion, firmly convinced in his own mind that he was not guilty because he had been told by trial counsel that guilt required him to know that PetroPlus was the taxpayer:

> At the time of this conversation about a possible guilty plea, I absolutely knew in my heart that I had never believed that PetroPlus was the taxpayer . . . I took the stand and told the jury I was aware that my suppliers had not paid their taxes on the fuel. But I thought this was a defense since I also told the jury that I had never believed that PetroPlus was the taxpayer, and I thought (based on trial counsel's advice) that this belief had to be proved to convict me.

[Enright Affidavit, ¶9]

Had Enright been correctly advised and thus understood that the government did not have to prove that he knew PetroPlus was the taxpayer, he would have pursued a plea:

> Had anyone advised me, while there was still an opportunity to plea bargain, that [trial counsel] had been mistaken and thus that I could indeed be convicted without proof that I knew

> PetroPlus was the taxpayer, I would have told [trial counsel] to pursue the plea discussions, rather than going to trial, spending well over two million dollars on a trial defense, just to end it by taking the stand and admitting that I knew the taxes had not been paid by those companies from which PetroPlus bought the fuel.

[Enright Declaration, ¶11]

The mistake in law was not only clear; it was, as the district court said during the trial "everything here." The district court itself noted at trial that if the government indeed had to prove that Enright knew PetroPlus was the taxpayer, it could not have done so:

> It really seems to implicate more squarely the question of dismissal because if the government has to prove the state of mind, the state of mind of each defendant was that they knew beyond a reasonable doubt that PetroPlus was the taxpayer, that has Rule 29 implications, to say nothing of charge implications, but it certainly has Rule 29 implications.

[Tr. 14873]

The Decision Below

The district court denied Enright's claim using grounds that were simply incorrect. To the claim that his lawyer was wrong on the law and in the face of all the statements of the courts below that the lawyer was "clearly" wrong, it held that Enright had not shown a lack of research.

To the claim that there had been a favorable plea overture which was stymied by counsel's bad advice, the district court held that it did not count as it was not "formal." App. 13a; *Enright, supra*, 347 F.Supp.2d at 165. In doing so (*Id.*, n.4), it noted that the Second Circuit, in *Gordon, supra*, 156 F.3d 376, had held that there was no need for a formal offer, but read the Third Circuit as requiring such an offer.[5]

The district court also trumpeted the "highly deferential" way in which courts should look at counsel's performance, and surely gave counsel such deference and then some. It excused his misadvice because, despite how "clearly wrong" that advice had been seen by this same district court during the trial, and how badly counsel's legal theory had been trounced on appeal, Enright had not alleged that the error was for want of adequate research.

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[5] *Gordon* reads: . . . the district court noted that whether the government had made a formal plea offer was irrelevant because Gordon was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial. We agree with this conclusion." 156 F.2d at 376.

We know that this Court for good reason normally abjures fact-finding. Yet it must be said that several of the district court's findings, while not necessarily in need of correction in order to reach the merits of this petition, are worthy of note. In the first place, the court noted that Enright simply "could not have sufficiently allocated facts" (App. 15a; *Enright, supra*, 347 F.Supp.2d at 166) for the court to have accepted a guilty plea, even if Enright's legal positions as advanced below (and in this petition) were sustained. Yet in the very same opinion, the same court held that Enright's own trial testimony "flat out admitted his guilt." App. 7a; *Enright, supra*, 347 F.Supp.2d at 162. As the same court noted years earlier:

> It was stunning. . . . because you can convict him out of his own words . . . Mr. Enright got on the stand and flat out admitted he knew that the taxes were not being paid.

Transcript of Sentencing Hearing, October 14, 1998, p. 21] These findings make our point that Enright was prejudicially misadvised, and do not support the notion that he could not have allocated guilt. According to these *verbatim* quotes, the court below found that, during trial, Enright did just that.

The district court also found various facts contrary to Enright's sworn affidavit filed below, without holding a hearing, yet making credibility judgments as if it had done so.

Such hostility to an ineffective-counsel claim should not stand.

REASONS FOR GRANTING WRIT

Importance of the issues

As ever, plea-bargaining remains the lynchpin of the successful operation of our criminal courts. See *Gordon*, *supra*, 156 F.3d at 380: "The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case." We kid ourselves if we think we can run this system without an intelligently-administered plea-bargaining process that commences with informed counsel having informal discussions with the prosecutor and then his client, and culminates with a formal plea.

The plea-bargaining process must start with discussions. It is really at odds with the way the world works to require a formal plea offer (as the district court holds in direct conflict with the Second Circuit's decision in *Gordon*, *supra*, App. 13a) before counsel's advice about a possible plea can be considered. A formal plea agreement is virtually never written before discussions lead the lawyers to conclude that it is worth drafting. It is normally the product of discussions, not the starting point. If bad advice by a lawyer leads his client not to pursue a sentence that the prosecutor has offered as acceptable, perhaps bargaining for a lesser sentence while keeping the door open to the one suggested, the client has just as surely lost an

opportunity to save a huge part of his life (here about ten extra years) while also saving considerably on public resources. "Crystal clear" (the district court's words at trial) error on the part of trial counsel which cuts off this opportunity simply should not be immunized. To the contrary, it should be admonished as a way of encouraging vigorous pursuit of any plea possibility.

The source of effective pursuit of this vital part of the process is trial counsel's accurate understanding of the charges and the early explanation to the defendant of the government's proof requirements. Unless these are correctly explained and thus understood, no defendant can intelligently decide whether to plead or stand for trial:

> An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.

Boria, supra, 99 F.3d at 497. This function is simply not discharged where counsel is "clearly" wrong on the "key" issue of the case, regardless of whether he attempted to research the law or not.

Such reasoning, if allowed to take root, would eviscerate the well-accepted, two-pronged test of this Court's decision in *Strickland v. Washington*, 466 U.S. 668,104 S.Ct. 2052 (1984), to the effect

that ineffective assistance is shown where counsel's mistake is clearly substandard (*objectively*, regardless of what effort has been expended), and causes prejudice. Replacing Strickland's workable test with the "A-for-effort"[6] rational used below would be a standard both impossible for the court to fathom and surely unfair to defendants.

Conversely, insisting that counsel know the law and clearly communicate it to the defendant in the context of a plea discussion ensures that pleas will continue to be intelligently considered, with the product being fewer needless trials, and the savings of considerable resources. No better example can be found of the importance of this point than Enright's trial, which took nine months of court time and which would have been avoided had counsel not fouled up.[7]

It is also important to staunch the notion, advanced by the Court below, that the deference

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[6] Not even a first-year law student could obtain a higher grade by pleading that his mistakes on the final exam were despite hard effort, nor could a putative lawyer change a failed bar examination grade to a passing one by the same plea. Once licensed, a lawyer's mistakes are never examined through the lens of how hard the lawyer worked, but rather by the nature of the mistake and its consequences. That, indeed, is the precise, two-pronged test in all ineffective-counsel cases. See *Strickland*, discussed in the text. The game of horse-shoes, this profession is not.

[7] We note in this regard that the petition below does not seek a new trial, but only an adjustment of the sentence to what it would have been had Enright been competently advised of the proof requirements and had pleaded guilty as he should have done. See, *Boria*, *supra*, where the remedy was a downward adjustment of the sentence to put the defendant in the position he would have been in had his counsel not misadvised him.

given to tactics during a criminal trial should also cover legal mistakes such as the one occurring here. The rational behind the deference to tactics has no place in the quiet law office, well before trial, where the lawyer, under no trial pressure, is explaining the government's case and its proof requirements in the context of what should be a deliberate and intelligent discussion about pleas.

ARGUMENT

The Court Below Erred Completely

The district court's expressed requirement of a "formal" plea offer is simply in conflict with the Second Circuit. *Gordon*, *supra*. *Gordon* is surely the better approach for the reasons stated above.

As to the notion advanced by the court below that counsel's misreading of the law should be viewed deferentially because of the presumption afforded defense counsel, the Second Circuit has stated, also in direct conflict with the decision below:

> More importantly, the *Strickland* Court did not intend its "strong presumption" to apply to a case such as this. It made clear that the purpose of the presumption was to protect lawyers from having strategic decisions judged with "the distorting effects of hindsight." Greenwald [Boria's

> Attorney] was confronted with no strategic decision . . .

Boria, supra, 99 F.3d at 498.

The same was noted in *Gordon, supra*, 156 F.3d 376, 380-81 (2d Cir. 1998), a case where defense lawyer misunderstood the law (relating to mandatory minimums) and thus misinformed his client in a way which prompted the client not to pursue a plea overture when he would have had he not been misadvised:

> Gordon relied on his counsel's erroneous advice regarding the risks of trial in formulating his decision to reject plea negotiations, maintain his innocence, and go to trial.

[*Id.* 156 F.3d at 380] There was no indulgence in the presumption here either.

Finally, the district court had advanced no case for its novel holding that the 2255 must fail because, despite the bad advice, there was no allegation that counsel did not research the matter. It is the quality of the advice that counts, and we have found no case even hinting otherwise.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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Dated: June 22, 2005

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APPENDIX A

BPS-176 March 3, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. NO. **05-1071**

DANIEL ENRIGHT,

v.

UNITED STATES OF AMERICA

(D.N.J. Civ. No. 03-cv-05640)

Present: RENDELL, FISHER AND VAN ANTWERPEN, **CIRCUIT JUDGES**

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/SR/lml

ORDER

The foregoing request for a certificate of appealability is denied because we conclude that the appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

By the Court,

/s/ D. Michael Fisher
Circuit Judge

Dated: March 24, 2005
CRG/cc: John J.E. Markham, Esq.
Alan Hechtkopf, Esq.
George S. Leone, Esq.
Robert E. Lindsay, Esq.
Karen Quesnel, Esq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL ENRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 03-5640 (JEI)

OPINION

APPEARANCES:

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IRENAS, Senior District Judge:

Currently before the Court is Petitioner's application for writ of habeas corpus filed pursuant to 28 U.S.C. § 2255. Petitioner argues that his sentence should be vacated and corrected because he was denied his Sixth Amendment right to effective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984). For the reasons set forth below, the Petitioner's application is denied.

I.

Daniel Enright was convicted on June 19, 1998, after a nine and a half month trial, of one court of conspiracy to defraud the United States, commit tax evasion, wire fraud and money laundering in violation of 18 U.S.C. § 371; fourteen counts of excise tax evasion in violation of 26 U.S.C. § 7201; eleven counts of wire fraud in violation of 18 U.S.C. § 1343; ten counts of money laundering in violation of 18 U.S.C. § 1957, and one count of evading currency reporting requirements in violation of 31 U.S.C. § 5316(a). On February 10, 1999, he was

sentenced by this Court to a period of 200 months of incarceration.

The voluminous evidence presented against Enright at trial established that he and his co-conspirators took part in a "daisy chain" scheme to evade over $132,000,000 in federal excise taxes on the sale of motor fuels. Enright was the president of PetroPlus, a small distributor of motor fuels. Enright and his co-conspirators took advantage of the tax-paid fuels market, in which wholesale fuel distributors holding valid Internal Revenue Service Registrations for Tax-Free Transactions ("Form 637") are permitted to make tax-free sales and purchases from other Form 637 holders. The last wholesaler in the distribution chain with a Form 637 was responsible for the payment of the excise tax. The cost of the tax was usually passed on to the companies that are the final buyers of the fuel.[1]

Enright and his co-conspirators set up a series of false middlemen and sham transactions to make it appear that PetroPlus was purchasing fuel with the taxes included in the sales price. In reality, PetroPlus was buying fuel directly from Kings Motor Oils ("Kings") without the taxes being paid by either company. Kings, a Form 637 holder, made paper sales without taxes being paid to middle companies, some of which were legitimate business with valid Form 637s and some were little more than an address, fax and phone number. These false transactions often went through several layers of middle companies in order to obscure which company was responsible for payment of the excise taxes. One

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[1] Changes to New Jersey law have since eliminated the tax-paid fuels market.

shell company was always positioned between Kings and PetroPlus as the "burn" company, and any sales before it in the chain were invoiced as tax-unpaid, whereas any sales after it (i.e. to PetroPlus) were invoiced as tax-paid. As a result, Kings and PetroPlus were always several degrees removed from the sale that on paper triggered the obligation to pay taxes.

Enright and his co-conspirators concealed this scheme through elaborate measures. Kings and PetroPlus communicated using cellular phones purchased and activated in the names of other companies. False invoices reflected sales of tax-exempt home heating oil until the sales passed through the "burn" company, after which they indicated sales of tax-paid motor fuel. Payments for the fuel were sometimes made through third parties, and sham companies outside the daisy chain were set up to be the conduits for those payments. The conspirators filled out the chain between Kings and PetroPlus with sham satellite offices of legitimate retail fuel suppliers as well as least eight shell companies holding an invalid or stolen Form 637.

From the beginning of the grand jury's investigation in this case in 1993, Enright was personally represented by Creed Black, Esq., while Peter Bennett, Esq., was counsel to PetroPlus. After the indictment was returned on August 3, 1995, Black and Bennett represented Enright as co-counsel for approximately one year. In the summer of 1996, Enright decided that Bennett's firm would represent him during the criminal trial.

At trial, Enright's defense was based on creating reasonable doubt as to whether PetroPlus was in fact the taxpayer or that Enright

had the requisite willfulness because he did not know PetroPlus was the taxpayer. Additionally, Bennett repeatedly and unsuccessfully argued that the government was required to prove that Enright knew that PetroPlus was the company responsible for paying the excise taxes, pursuing jury instructions to this effect. The trial culminated with Enright's admission, on the stand, that he knew that the excise taxes were not being paid for the fuel PetroPlus purchased. (R. at 13396-13419.)[2] This Court characterized such testimony as "shocking," and noted that Enright had "flat out admitted" his guilt. (Sent. Hearing, Oct. 14, 1998, p. 21.)

Enright appealed his conviction to the Third Circuit Court of Appeals. The essence of Enright's appeal was a challenge to this Court's rulings that the government needed to prove only that PetroPlus was the taxpayer, and not that Enright knew PetroPlus owed taxes that were being evaded. Enright specifically contested the charge given to the jury regarding willfulness and the government's burden of proof. In affirming this Court's instructions, the Third Circuit stated that "what the government had to prove was that PetroPlus was the taxpayer, *not that Enright knew that PetroPlus was the taxpayer.*" *United States v. Enright*, 46 Fed. Appx. 66, 70 (3d Cir. 2002). The Third Circuit also held that the evidence was sufficient for the jury to conclude that Enright had acted willfully. *Id.* at 71. It noted again that it disagreed with Enright's theory of the case that the government was required to prove that he knew PetroPlus was responsible for the payment

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[2] "R." refers to the specific page or pages in the trial record.

of excise taxes, and held that willfulness may be inferred from Enright's actions. *Id.*[3]

The Supreme Court denied certiorari on December 2, 2002. *United States v. Enright*, 537 U.S. 1044 (2002)(mem.). Enright filed this petition for habeas corpus in the District of New Jersey on November 26, 2003.

II.

Petitioner brings this motion pursuant to 28 U.S.C. § 2255. Section 2255 provides, in pertinent part, that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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[3] Enright also raised two additional issues on appeal which are not directly relevant to his habeas petition. First, he argued that this Court improperly allowed the government to constructively amend the indictment during trial. Alternatively, Enright contended that the government's proof at trial varied from the allegations of the superseding indictment to such a degree that he was prejudiced by the variance. Next, he alleged that this Court made several errors in sentencing. The Third Circuit rejected these claims. Enright, 46 Fed.Appx. at 71-74.

28 U.S.C. § 2255 (2000). Thus, Petitioner is entitled to relief only if he can establish that he is in custody in violation of federal law or the Constitution.

A district court is given discretion in determining whether to hold an evidentiary hearing on a habeas petition under Section 2255. *See Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the court must first determine whether the petitioner's claims, if proven, would entitle him to relief, and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. *See Government of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 574 (3d Cir. 1994). Accordingly, a district court may summarily dismiss a motion brought under Section 2255 without a hearing where the "motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992)); *Forte*, 865 F.2d at 62.

Enright alleges that he was provided ineffective assistance of counsel by his trial attorney Peter Bennett, in violation of the Sixth Amendment. Specifically, Enright contends that Bennett wrongly advised him as to what the government was required to prove in order for the jury to convict him of tax evasion. He alleges that Bennett advised him that the government must prove that Enright knew that PetroPlus was responsible for the payment of excise taxes on its purchases, a legal position that was rejected by this Court and the Third Circuit. As a result of this erroneous advice, Enright alleges that he rejected a plea overture from the government

because he believed he was innocent, or rather, that the government could not prove he knew PetroPlus owed the excise taxes because he claims he did not know PetroPlus was the taxpayer.

For the reasons outlined below, the Court finds that an evidentiary hearing is not necessary because the evidence in the record conclusively demonstrates that Enright is not entitled to the relief sought.

III.

The Supreme Court has long recognized that the Sixth Amendment right to counsel exists in order to protect a defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). This right to counsel includes within it the right to *effective assistance* of counsel. *Id.* at 686; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). In *Strickland*, the Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *See also Rompilla v. Horn*, 355 F.3d 233, 246 (3d Cir. 2004).

A convicted defendant seeking to have his conviction or sentence vacated due to the incompetence of counsel must show that his counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687. The first prong of this test requires a habeas petitioner to demonstrate that his lawyer "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment," such that counsel's representation fell below an objective standard of reasonableness. *Id.* Second, the petitioner must show that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Id.* at 694. "A reasonable probably is a probability sufficient to undermine confidence in the outcome." *Id.*

The Third Circuit has held that a habeas petitioner states a claim under the Sixth Amendment when he contends that the advice he received from counsel regarding a plea bargain was so insufficient or incorrect as to undermine his ability to make an intelligent decision whether to accept the plea offer. *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (stating that "a defendant has the right to make a reasonably informed decision whether to accept a plea offer"); *United States v. Barber*, 808 F.Supp. 361, 378 (D.N.J. 1992). *See also Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (voluntariness of guilty plea depends on adequacy of counsel's advice); Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*. 201 (1988) ("counsel may and *must* give the client the benefit of counsel's professional advice on this crucial decision [whether to plead guilty]"). A subsequent fair trial does not remedy counsel's incompetence at the plea bargaining stage. *Day*, 969 F.2d at 44-45.

A court reviewing a habeas petitioner's claim of ineffective assistance of counsel need not determine whether counsel's performance fell below an objective standard of reasonableness before addressing whether the defendant was prejudiced by counsel's errors. *Strickland*, 466

U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* As such, the Court will first address whether Enright was prejudiced by Bennett's alleged misrepresentation of the law regarding willfulness.

A.

In the context of claims regarding the assistance of counsel at the plea bargaining stage where a defendant eventually proceeded to trial, a habeas petitioner must establish three components in order to demonstrate prejudice. He must prove that a plea offer was extended by the government, and that a reasonable probability exists that he would have accepted the plea offer and the court would have approved the agreement. *Day*, 969 F.2d at 44-45. *See also United States v. Pungitore*, 15 F.Supp.2d 705, 733 (E.D. Pa. 1998); *Barber*, 808 F.Supp. at 378.

It is undisputed that there was no formal plea offer extended by the government. On December 9, 1995, Bennett and Assistant United States Attorney Robert G. Stahl had a phone discussion regarding several matters in Enright's case. At the end of the conversation, Bennett asked Stahl to give a sentencing range for a possible plea agreement. Stahl suggested seven or eight years, and Bennett replied that he did not think that Enright would accept such a long sentence. The following day, Bennett communicated the substance of his conversation with Stahl to Enright. Government's Mem. of Law in Opp., Exs. A, B, C.

The short discussion that occurred between Bennett and Stahl was not sufficient to satisfy *Day*. Although a sentencing range was briefly discussed, no specific offer was made even informally, nor did the attorneys discuss the details of the charges Enright would plead to or the facts to which he would allocute. It would be a closer question if the plea discussions had advanced to a more formal stage, yet still short of a written offer, but the brief conversation between the attorneys was no more than perfunctory.[4]

Even if a formal plea offer had been made, Enright cannot demonstrate that there was even a reasonable probability he would have accepted. Contrary to Enright's assertion in his habeas petition, his trial defense was not solely based on the question of willfulness. Enright's defense had two main contentions. First, he maintained that Petroplus was not *in fact* the taxpayer. Second, he contended that in any event he did not know that Petroplus was the taxpayer. *Even if* Bennett had advised Enright that the government was not required to prove that he knew that Petroplus was the taxpayer, the first prong of his defense remained in force.

The Court cannot assume that Bennett's mistaken advice was the crucial factor in Enright's decision, even if we accepted Enright's argument that Bennett was objectively

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[4] Enright's reliance on the Second Circuit's decision in United States v. Gordon, 156 F.3d 376 (2d Cir. 1998) is inapposite. The Second Circuit has not adopted the Day formula for assessing prejudice in the context of ineffective assistance of counsel claims arising from plea bargaining. Therefore, the Gordon Court's holding that it was irrelevant whether a formal plea offer had been made is not instructive in a circuit where the existence of a formal plea offer has been held to be relevant. See Day, 969 F.2d at 44-45.

unreasonable in advising him that the government had to establish that he knew Petroplus was the taxpayer. Enright was aware of the ample evidence from which the jury could *infer* that he knew that Petroplus was the tax-payer. A significant portion of the government's was intended to prove that Kings sold the tax-paid fuel directly to Petroplus, and that the intervening transactions were shams devised by Enright and his co-conspirators.

The jury could easily have inferred that Enright knew PetroPlus owed taxes on the fuel sales from the significant efforts he was privy to or undertook to conceal the tax evasion, including that he and his co-conspirators "made false entries and alterations in the books and records of the companies involved in the daisy chain, created false invoices and documents, destroyed relevant records, concealed assets, and covered up sources of income." *Enright*, 46 Fed.Appx. at 71. Enright's suggestion that his decision whether to pursue a plea bargain was determined solely by counsel's mischaracterization of the government's burden and his personal belief that he did not know that PetroPlus was the tax-payer is not credible in light of the overwhelming evidence against him.

The Third Circuit has not affirmatively adopted or rejected an objective evidence requirement for demonstrating that a habeas petitioner would have accepted a plea offer, but it is clear that something more than a bare allegation is required. *See Barber*, 808 F.Supp. at 378; *Day*, 969 F.2d at 45-46. Enright has offered nothing more than a statement that he would have pled guilty. To the contrary, however, is his statement to Bennett that he would not plead guilty in

exchange for only a six-month sentence and his refusal to authorize further plea discussions with the government. Government's Mem. of Law. in Opp., Ex. B, ¶ 6.

It is also evident that Enright could not have sufficiently allocuted to the facts of the indictment so that this Court could accept the plea arrangement. In his declaration supporting his habeas petition, Enright still does not accept or acknowledge the significant evidence of his involvement in a conspiracy to evade taxes. He admits only to taking advantage of other parties' willingness to evade taxes, so that he and his company could profit. Decl. of D. Enright, ¶¶ 15-16. He does not acknowledge the existence of the "daisy chain" and continues to maintain that the transactions separating Kings and PetroPlus were not shams designed to blur the issue of tax liability. *See* Decl. of D. Enright, ¶ 5. Without Enright allocuting to more than being just an unscrupulous businessman, this Court would not have accepted a plea bargain.

B.

The standard for determining deficient performance is whether counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Courts must be "highly deferential" to counsel's reasonable strategic decisions. *Id.* at 689; *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). "Thus, the court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. . . .

the mere existence of alternative - even preferable or more effective - strategies does not satisfy the requirements of demonstrating ineffectiveness under *Strickland*." *Marshall*, 307 F.3d at 85-86.

Enright argues that his counsel's performance was objectively unreasonable because Bennett incorrectly advised him as to the government's burden of proof regarding his willfulness. Enright alleges that Bennett told him that the government must prove Enright knew PetroPlus was responsible for paying the taxes owed on the fuel purchases, and that such advice was "simply wrong."[5] Enright's Mem. of Law at 10. However, it appears that Enright's belief that the government needed to prove that he knew PetroPlus was the taxpayer *predates* any advice given to him by Bennett, and in fact, predates Bennett's involvement in his case. Additionally, Enright has not alleged that Bennett's supposed mistake of law was due to a lack of investigation or diligence on counsel's part.

Enright's suggestion that he believed that the government needed to prove he knew that PetroPlus was the taxpayer as a result of advice he received from Bennett is simply not credible. The evidence shows that Enright was concerned with the issue of willfulness with regard to his transactions in the tax-paid fuels market prior to his indictment and trial. *See, e.g.* Government Trial Exs. DE-X-2 (Enright's notes from Nov. 24, 1989, conversation with Lou Savino), DE-X-5 (Enright's notes from Dec. 14, 1989, conversation

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[5] The Court notes that "pursuit of a legally barred defense is not per se deficient performance." Sams v. United States, No. CR 95-012, 1999 WL 680008, *4 (D.D.C., July 29, 1999). See also United States v. Agnes, Civ. No. 86-5367, 1987 WL 7398, *9 (E.D.Pa., March 3, 1987).

with Steve Picco), DE-X-7 (Draft opinion letter dated March 8, 1990, from Kenneth Mack to Enright), DE-X-8 (Enright's notes from March 9, 1990, on Mack letter), DE-X-9 (Second draft opinion letter dated March 12, 1990, from Kenneth Mack to Enright), and DE-X-10 (Enright's notes from April 2, 1990, on second Mack letter).

In several discussions with attorneys from the firm Picco, Mack, Kennedy, Jaffe, Perrella & Yoskin in late 1989 and early 1990, Enright pushed his lawyers to clarify the meaning of having "reason to know" that taxes were being evaded in a way that would provide cover for his activities. The firm submitted several draft opinion letters regarding PetroPlus' possible criminal and civil liability for its tax-paid fuels business. Enright repeatedly requested edits that would make it appear that he was advised that actual knowledge was required, or at the very least, was given a very narrow definition of "reason to know." At one point, Enright's handwritten notes indicate that the firm's advice on this point "hangs me." Government Trial Ex. DE-X-10.

Additionally, Enright's legal and business strategy prior to his investigation and indictment suggests that he knew or was advised about the fine line of the law on the issue of willfulness. He consulted with lawyers, the Internal Revenue Service and the State of New Jersey's equivalent agency in his attempts to provide cover for his position. He sought signed statements from his suppliers that all taxes had been paid on PetroPlus' purchases, even though the selling price clearly indicated that they were not.

Instead of seeking a legal opinion as to the dictates of the law, Enright pushed his lawyers to craft their interpretation of the law to suit his needs. The suggestion that Bennett provided erroneous legal advice is contradicted by the evidence that Enright himself dictated legal strategy to his lawyers from Picco, Mack, including the position that "reason to know" should be interpreted narrowly, well before Bennett became involved with his case. Enright's statement in his petition that his "understanding of the law here (and thus his guilt or innocence) was derived wholly from what his lawyers told him" misrepresents the situation. Enright's Mem. of Law at 23. To the contrary, Enright engaged in a lengthy dialogue with his lawyers regarding the precise limits of the tax evasion statute and its elements, pushing them to adopt an interpretation more favorable to Enright's position.

Given this Court's doubts regarding Enright's account of the advice given him by Bennett, this Court cannot conclude that Bennett's performance was deficient. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Although the Third Circuit held in *Day* that a defendant's right to effective assistance of counsel was violated where his attorney's erroneous advice regarding a plea offer undermined his ability to make an intelligent decision, the Court refused to define a precise

standard of performance of defense counsel in the plea bargaining context.[6] *Day*, 969 F.2d at 43.

Here, Bennett's overall performance throughout trial illustrates that he was not ill-informed nor did he misunderstand the applicable law. Enright has not alleged that Bennett failed to research his position, nor could he, given the understanding of the applicable law that Bennett brought to his arguments. *See, e.g.*, Letters to the Court dated April 8, 1998, May 26, 1998, and June 1, 1998, regarding Enright's Motion for Acquittal and Proposed Jury Instructions. Unlike *Kimmelman v. Morrison*, where the United States Supreme Court affirmed the district court's determination that defense counsel's performance was unconstitutionally deficient, if Bennett had misunderstood the law, it was not due to any failure by him to adequately prepare for Enright's defense. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 384-85 (1986) (characterizing defense counsel's professed ignorance of the law as "a weak attempt to shift blame for inadequate preparation").

Enright speculates that "[p]erhaps Mr. Bennett wanted a trial for some other reason" and closes with the unsupported conclusory statement that "he surely performed in a substandard way in explaining the risks to Enright." Enright's Reply Mem. of Law at 3. However, during Enright's

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[6] Providing incorrect advice regarding a possible plea is not per se deficient. See, e.g. Hill v. Lockhart, 474 U.S. 52, 60 (1985) (reserving the issue of whether incorrect advice regarding parole eligibility could be deemed deficient performance); Day, 969 F.2d at 43; United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (reserving the issue of whether counsel's performance was deficient in light of holding that petitioner was not prejudiced by counsel's failure to inform him of deportation consequences of guilty plea).

appeals, his current counsel described Bennett's strategy - the same strategy he now assails in Enright's habeas petition as wholly incorrect - as the "classic tax evasion defense." Appellant's Brief at 12. Although it is unnecessary for this Court to reach the issue of deficient performance given that Enright is unable to demonstrate prejudice, this is not enough to overcome the presumption of reasonableness accorded counsel by *Strickland*.

III.

For the reasons set forth above, this Court will deny Petitioner's application for a writ of habeas corpus and request for a hearing pursuant to 28 U.S.C. § 2255. The Court will issue an appropriate order.

Date: 12/10/04

s/Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

APPENDIX C

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5144

UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-1)
District Judge: Hon. Joseph E. Irenas

Argued March 7, 2002

Before: SCIRICA and COWEN, Circuit Judges,
RESTANI*, Judge, United States Court of
International Trade

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

(Filed April 18, 2002)

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OPINION

COWEN, Circuit Judge

Daniel Enright was found guilty of violating 18 U.S.C. § 371 by conspiring to defraud the United States, to commit tax evasion (in violation

of 26 U.S.C. § 7201), commit wire fraud on the State of New Jersey (in violation of 18 U.S.C. § 1343), and to commit money laundering (in violation of 18 U.S.C. § 1957). He was also convicted of fourteen counts of attempting to evade excise taxes (in violation of 26 U.S.C. § 7201), eleven counts of wire fraud (in violation of 18 U.S.C. § 1343), eleven counts of money laundering (in violation of 18 U.S.C. § 1957), and one count of evading currency reporting requirements (in violation of 31 U.S.C. §§ 5316, 5322). Enright was sentenced to 200 months, and ordered to pay $1,000,000 in restitution. He challenges the sufficiency of the evidence to support his conviction, some of the District Court's evidentiary rulings and jury instructions, as well as his sentence. He also asserts that the District Court improperly allowed an amendment to or variance from the terms of the indictment. We will affirm.[7]

I.

Enright and his coconspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel. The elements of such schemes have been detailed sufficiently

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[7] Currently before this Court are four appeals arising from the same trial, of which Enright's appeal is one, *See United States v. Enright*, No. 99-5144; *United States v. Pedroni*, 99-5182; *United States v. Karamanos*, No. 99-5212; *United States v. Erlikh*, No. 99-5281. We granted counsel leave to file oversized briefs in ordered that there be no repetition of issues in the briefs. To the extent issues in this Memorandum Opinion apply to any or all of the other three Appellants in this case, we deem the Appellants' arguments to be without merit and affirm the Appellants' convictions and sentences.

elsewhere. *See, e.g., United States v. Morelli*, 169 F.3d 798, 801 (3d Cir. 1999), *cert. denied*, 528 U.S. 820, 120 S.Ct. 63 (1999) (citations omitted). During the prosecution period, Enright operated as the president of Petro Plus Oil ("PetroPlus"), a company that bought and sold fuel at the bottom of the chain. We will add further factual detail below as it becomes necessary to the legal discussion.

Enright was convicted of a multiple-object conspiracy contained in Count One of the Superseding Indictment, along with multiple counts of tax evasion, wire fraud, money laundering, and evading currency reporting requirements.

II.

A. Sufficiency of the Evidence PetroPlus Was The Taxpayer

Enright argues that because PetroPlus was not the federal or New Jersey state excise taxpayer, the evasion counts should have been dismissed. When reviewing the sufficiency of the evidence to sustain a conviction, we must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See United States v. Veksler*, 62 F.3d 544, 551 (3d Cir. 1995) (citations omitted).

We are satisfied that a rational finder of fact could conclude beyond a reasonable doubt that the government met its burden of proof. A jury

could rationally conclude that PetroPlus was responsible for the unpaid federal and New Jersey State excise taxes. The record is replete with evidence of an agreement between Enright and his coconspirators whereby Kings would purchase number 2 oil from a major fuel supplier in a tax-free transaction to be delivered to PetroPlus in subsequent transactions without the taxes ever being paid. This involved an elaborate and complex daisy chain involving fictitious paper sales of the fuel to make it appear that a sham company above PetroPlus in the chain had actually incurred and paid the taxes on the sale of the number 2 oil, when in fact the taxes had not been payed. The record also reflects that PetroPlus then sold the oil at prices that purported to include the federal and New Jersey state excise taxes, when in reality as well known to Enright the taxes had never been payed. The record reflects numerous other examples from the paper trail of the daisy chain.

The jury considered and rejected Enright's claim that PetroPlus did not incur the tax liability. The District Court specifically instructed the jury that, in determining whether the government had proven the attempted evasion of tax charged in the indictment beyond a reasonable doubt, the "first question for you to determine is whether a tax was due and owing from PetroPlus to the United States." App. at 614. It is apparent from the voluminous record that the trial provided overwhelming evidence from which a rational jury could find beyond a reasonable doubt that PetroPlus incurred the taxes.

B. Jury Instructions

Enright argues that the District Court improperly charged the jury on knowingly and willfully. He cites no legal authority in his two-paragraph analysis on this issue.[8] "We will reverse the [D]istrict [C]ourt's denial to charge a specific jury instruction only when the requested instruction was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." *United States v. Phillips*, 959 F.2d 1187, 1191 (3d Cir. 1992). Our review of whether the District Court stated the appropriate legal standards in its charge is plenary. *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997). The jury charge must clearly articulate the legal standards at issue and be structured to avoid confusion, and we examine the charge in its entirety. *Id.*

The District Court charged the jury as follows:

> The word "willfully," as used in section 7201, means a voluntary, intentional violation of a known legal duty. Under section 7201, a defendant has a legal duty not to act to evade a tax obligation. Thus, to find a defendant guilty, you must find that the Government has proven that

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[8] *See* Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies).

> he or she acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by the tax laws that a defendant knew there was a legal duty to pay. An act is done "knowingly" only if it is done purposely and deliberately and not because of mistake, accident, negligence, or other innocent reason.
>
> Although, as I previously instructed, you must find beyond a reasonable doubt that PetroPlus owed unpaid taxes, it is not required that you find a particular defendant knew who was the proper taxpayer. However, you must find beyond a reasonable doubt that a defendant acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by law that a defendant knew there was a legal duty to pay.

App. at 617. Enright is incorrect in his assertion that the government had to prove that Enright knew that PetroPlus owed the taxes at issue. *See United States v. Voigt*, 89 F.3d 1050, 1089-90 (3d Cir. 1996); *United States v. Wisenbaker*, 14 F.3d 1022, 1024-25 (5th Cir. 1994). Among other things, what the government had to prove was that PetroPlus was the taxpayer, not that Enright knew that PetroPlus was the taxpayer. Read in

its entirety, the District Court properly charged the jury.

Enright also argues that the following instruction was tantamount to a directed verdict:

> If, in good faith, a defendant believed that he or she was not violating the Internal Revenue laws, then such defendant cannot be guilty of tax evasion.
>
> . . .
>
> The test is whether a defendant personally believed in good faith that all properly reportable excise taxes due under the Internal Revenue Code had been reported and paid.

App. at 620-21. Reviewing the charge in its entirety, we find no error with the instruction. As discussed above, the government did not need to prove that Enright (or any of his coconspirators) knew the identity of the taxpayer in order to establish willfulness. The belief that someone other than PetroPlus owed the taxes did not constitute a defense to the crimes charged in the superseding indictment.

Enright also challenges the District Court's instruction on sham transactions. The District Court gave the following instruction on sham transactions:

> [I]t is not lawful for parties to conduct transactions which, rather than

> having any business purpose or economic substance, are conducted solely for the purpose of evading taxes. Therefore, where a transaction is found to have been conducted for the sole purpose of evading tax liability, the Internal Revenue Service is permitted to ignore or reject the form of that transaction, and look instead at its economic reality for purposes of imposing the proper tax on the appropriate party or parties.

App. at 623. Having read the charge to the jury in its entirety, we find no error with the instruction. *See United States v. Wexler*, 31 F.3d 117, 122 (3d Cir. 1994).

C. Sufficiency of the Evidence Enright Acted Willfully

Enright challenges the sufficiency of the evidence adduced at trial that he acted willfully. We must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See Veksler*, 62 F.3d at 551 (citations omitted).

Enright asserts that to show willfulness, the government had to prove that he knew PetroPlus owed the taxes due on the fuel sales at issue. We disagree with such a theory of the case. Willfulness may be inferred. *See Voigt*, 89 F.3d at 1090. There is ample evidence in the

record from which a reasonable jury could infer that Enright acted willfully to evade the taxes. Whether he knew who the ultimate taxpayer should have been is irrelevant. Enright testified that he knew the taxes had not been payed. App. at 621. To further and conceal the tax evasion, Enright and his coconspirators made false entries and alterations in the books and records of the companies involved in the daisy chain, created false invoices and documents, destroyed relevant records, concealed assets, and covered up sources of income. *See, e.g., Spies v. United States*, 317 U.S. 492, 499, 63 S.Ct. 364, 368 (1943); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir. 1984). Numerous deceptions exist in the record, along with evidence of Enright's vast experience and tenure in the oil business. We will not disturb the jury's finding of willfulness.

D. Constructive Amendment and Variance Issues

Enright argues that the District Court should have acquitted him on the conspiracy and evasion counts because the District Court permitted the government to constructively amend the indictment during trial, a *per se* reversible error. *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S.Ct. 270, 272-73 (1960). In the alternative he argues that the proof adduced at trial varied from the allegations in the superseding indictment such that it would constitute a reversible error. A variance constitutes reversible error only if Enright were

prejudiced by the variance. *See United States v. Perez*, 280 F.3d 318, 346 (3d Cir. 2002). We reject both of Enright's theories because they are based on the same misreading of the superseding indictment.

Enright takes issue with wording found in the superseding indictment in the conspiracy count and all of the evasion counts: "knowingly, willfully, and unlawfully evaded and defeated the federal excise taxes *due and owing from PetroPlus* to the United States." (Counts 1, 24-37) (emphasis added). Enright contends that the superseding indictment charged him only with owing taxes due and owing from PetroPlus, and that at trial there was no proof that the transactions above PetroPlus in the daisy chain were sham transactions or that PetroPlus was responsible for the taxes. In other words, the government failed to meet its burden of proof that PetroPlus (as opposed to other companies involved in earlier transactions in the daisy chain) owed the taxes. According to Enright, this constituted a constructive amendment or variance. We do not agree with Enright's restrictive reading of the superseding indictment.

In *United States v. Wisenbaker*, the Fifth Circuit was confronted with an almost identical fact pattern. 14 F.3d 1022 (5th Cir. 1994). The defendant alleged that the indictment charged only him with tax evasion, but that the proof adduced at trial that he had assisted others, namely his customers, in evading their taxes constituted an amendment or variance. *Id.* at

1026. The indictment at issue in *Wisenbaker* read:

> [T]he defendant Houston M. Wisenbaker, Jr., did knowingly, willfully, and unlawfully attempt to evade and defeat federal excise taxes . . . by making and causing to be made false invoices; by using numerous entities to conceal the purchase of tax-free diesel fuel; by dealing in currency and cashier's checks; by failing to make a Quarterly Excise Tax Return, Form 720, . . . as required by law, with any proper officer of the Internal Revenue Service; and by other means.

Id. The Court of Appeals for the Fifth Circuit did "not find the language of the indictment susceptible to the restrictive reading [the defendant] wishe[d] to impose on [the Court]." *Id.* at 1027. As the Court explained, "[t]he indictment contains no terms restricting it to an allegation that Wisenbaker failed to pay his own taxes. It *fairly encompasses* the government's theory that Wisenbaker also violated I.R.C. § 7201 by evading any taxes his customers owed but did not pay because of Wisenbaker's false assurances that he had already paid the taxes." *Id.* (emphasis added).

As in *Wisenbaker*, each of the counts at issue (1 and 24-37) in the superseding indictment contains the phrase, ". . . the defendants . . . and

others . . . did knowingly, wilfully, and unlawfully attempt to evade and defeat and aided, abetted, counseled, commanded, induced and procured and caused the evasion and defeat of federal excise taxes . . . due and owing from PetroPlus, Inc." App. at 248, 300, 302, 304, 306, 308, 310, 312-21, 323, 325, 327. What Enright fails to consider is that each count, read as a whole, "fairly encompasses" the government's theory that PetroPlus was the taxpayer, and the government did not have to prove that Enright knew that PetroPlus owed the taxes. *Wisenbaker*, 14 F.3d at 1027.

The superseding indictment is 98 pages long. App. at 236-334. It devotes 37 paragraphs to the general terms of the daisy chain scheme and all of the individuals involved. App. at 236-45. The Introduction is incorporated into the first paragraph of every count. The conspiracy count contained in Count One of the superseding indictment consists of 32 pages (143 paragraphs), detailing the acts and individuals. App. at 246-78. The tax-evasion counts span 28 pages, and are likewise filled with detailed descriptions of the individuals and their acts. App. at 300-28. Reviewed in its entirety, we can say with confidence that the superseding indictment "fairly encompasses" the government's theory that PetroPlus was the taxpayer, and Enright was properly and fairly put on notice of this allegation. All of the same arguments can be made with regard to PetroPlus as the "State of New Jersey"

taxpayer, as well.[9] As discussed above, the government did not have to prove that Enright knew that PetroPlus owed the state taxes. The indictment sufficiently informed Enright of the charges against him so as to put him on notice to prepare his defense. The evidence adduced at trial constituted neither a variance from nor an amendment of the terms of the superseding indictment.

E. Sentencing

Enright raises several sentencing errors. We review a District Court's factual determinations underlying the application of the sentencing guidelines for clear error and exercise plenary review over legal questions involving the proper interpretation and application of the sentencing guidelines. *United States v. Helbling*, 209 F.3d 226, 242-43 (3d Cir. 2000), *cert. denied*, 531 U.S. 1100, 121 S.Ct. 833 (2001); 18 U.S.C. § 3742(e).

Enright adopts the argument of his co-Appellant, Erlikh, that the state misdemeanor conduct involved in this case did not fall near the heartland of the conduct covered by the laundering statutes. He argues that the conduct fell outside the "heartland" of money laundering,

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[9] As an initial matter, Enright cites no legal authority for its argument that the government changed the identity of the state tax payer from PetroPlus to "anyone." *See* Fed. R. App. P. 28(a)(9)(A) explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies). Our analysis regarding variance and amendment applies equally to both of Enright's arguments, federal and state.

and, therefore, the District Court erred by using the money laundering guideline in calculating his sentence. Enright asserts that the District Court should have used the tax evasion guideline instead of the money laundering guideline. We do not agree. The record demonstrates that Enright was involved in an elaborate, systematic scheme to defraud. Money derived from the scheme was used to keep the daisy chain going and the links in the chain were established to avoid detection by authorities. *See generally Morelli*, 169 F.3d at 805-809. This amounted to a crime of significant duration and marked severity. The total loss to the State of New Jersey on account of the daisy chain scheme was over 11 million dollars. The daisy chain constitutes serious criminal activity and is the conduct Congress sought to prevent when it proscribed money laundering. There was nothing "atypical" about Enright's conduct that would justify the District Court not using the money laundering guidelines. *See United States v. Chilingirian*, 280 F.3d 704, 713-14 (6th Cir. 2002).

Enright challenges the District Court's use of the 1998 Sentencing Guidelines to calculate his sentence. His argument, which consists of one paragraph in his brief and cites no authority, see Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies), is that the 1993 version of the Guidelines should have been used because the last tax evasion charge took place in June of 1993. The Guidelines themselves state that a

court should use the "Guidelines Manual in effect on the date that the defendant is sentenced" unless there is an *ex post facto* concern. U.S.S.G. §§ 1B1.11(a), 1B1.11(b)(1). The Guidelines also state that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." U.S.S.G. § 1B1.11(3). Enright alleges no *ex post facto* concern, and despite his assertions to the contrary, the record reveals that Enright's tax offenses were not completed until after the effective date of the November 1993 revisions to the Guidelines. We find no error.

Enright contends that his sentence "double counts" because the District Court improperly treated the federal tax evasion scheme as a separate group from the wire-fraud and money laundering activity. By grouping the offenses into these two groups, the District Court was able to add another two levels to the total offense level. Enright argues that the District Court should have grouped the tax evasion with his wire fraud and money laundering offenses, and then should have sentenced him under the tax evasion guidelines.

The District Court did not err in its grouping decision. Under U.S.S.G. § 1B1.1(a), the District Court had to first determine the base offense level for each count. Because multiple counts were involved, the District Court had to group "closely related" counts together to determine a single offense level. U.S.S.G. §

1B1.1(d). In the case of a multiple-object conspiracy, each object offense is treated as a count of conviction. U.S.S.G. §§ 1B1.2(d), 3D1.2, comment. (n. 8). In grouping "closely related" counts, the District Court must group those counts together that involve "substantially the same harm," meaning "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2 (d). The tax evasion guideline bases the offense level on the amount of money involved, while the guideline for money laundering does not. *See, e.g., United States v. Napoli*, 179 F.3d 1, 10 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162, 120 S.Ct. 1176 (2000); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992). As for wire fraud, it has been found to be a crime that is "distinct from [its] underlying predicate acts and purposes and involve[s] additional harms." *See United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991). Another difference to note is the ongoing and continuous nature of the money laundering and wire fraud offenses. More distinctions exist that we need not enumerate. The District Court did not err when it determined that the tax evasion offenses did not involve substantially the same harm as the money laundering and wire fraud convictions.

Enright argues that the District Court erred by not awarding him a downward departure for acceptance of responsibility. Section 3E1.1(a)

permits a district court to reduce a defendant's offense level by two points if the district court finds that "the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). Application Note 2 provides that the adjustment is not intended to "apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n. 2). The record is clear that Enright did not demonstrate acceptance of responsibility. The trial lasted nine and a half months, and put the government to its burden. Enright never admitted his guilt, denied any knowledge of the inner workings of the daisy scheme, and continues to deny his criminal intent to this day. The District Court gave Enright an enhancement for obstruction of justice, which according to the guidelines themselves is an indication that a defendant has not accepted responsibility for his criminal conduct. U.S.S.G. § 3E1.1 comment. (n. 4). Such events led the District Court to characterize Enright's behavior as "the dead opposite of acceptance of responsibility. It is the nonacceptance of responsibility." App. at 2647. We find no error in the District Court's refusal to grant Enright a reduction for acceptance of responsibility.

Enright also challenges the District Court's enhancement for obstruction of justice. A District Court should enhance a defendant's offense level by two if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the

administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. The record is clear Enright used offshore accounts to conceal funds and information from the I.R.S., and that Enright knew of the federal investigation into the daisy chain scheme while he used the offshore accounts. Other examples of Enright's efforts to avoid detection exist in the record as well. Enright has no authority for his proposition that the District Court was wrong to base its obstruction of justice enhancement on the overseas account because conduct cannot be both part of the offense charged and the basis of an enhancement.[10] Enright is also without authority for his argument that because the District Court imposed a two-point increase for a sophisticated act of concealment, it was in error for the District Court to also give an enhancement for obstruction of justice.[11] We find no error with the District Court's enhancement for obstruction of justice.

Enright contends that the District Court impermissibly exceeded the 6-12 month sentence that would result from U.S.S.G. § 2S1.3 when it imposed a sentence of 100 months for Count 39 of the superseding indictment. Enright cites no authority in his one-paragraph argument on this

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[10] *See* Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies).

[11] *See id.*

issue,[12] and we fail to see the point of his argument. The District Court calculated Enright's combined offense level at 36, and determined that his criminal history category was I. The Guideline range was 188-235, and the District Court determined that the appropriate total term of imprisonment was 200 months. In accordance with § 5G1.2(d), the District Court distributed the 200-month sentence over the multiple convictions, several of which (including Count 39) authorized confinement for up to 120 months. See 31 U.S.C. §§ 5316(a), 5322(b). We find no error.

III.

We have thoroughly reviewed all the arguments presented by Defendant in his submissions to this Court, and those presented at oral argument, and find no basis to disturb the multiple convictions or the sentence imposed by the District Court.[13] The judgment of conviction

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[12] *See id.*

[13] Enright makes a very broad argument that the conspiracy count charges are subject to the same defects as the substantive counts which he addresses throughout his brief. Brief at 79-82. As summarized in his own words, "the conviction on Count I cannot be predicated on the basis of such a general fraud-against-the-government theory in this case for three separate reasons relating to the defects in the way the substantive counts were handled below." Brief at 80. We have found no defects in how the District Court handled the substantive counts below. Further, the three additional defects identified by Enright regarding the uncertainty as to which theory the jury relied upon in convicting him of Count I are without merit.

entered February 16, 1999 will hereby be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/Robert E. Cowen

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5144

UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-1)
District Judge: Hon. Joseph E. Irenas

Argued March 7, 2002

Before: SCIRICA and COWEN, Circuit Judges,
RESTANI*, Judge, United States Court of
International Trade

JUDGMENT

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 7, 2002. On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on February 16, 1999, be and the same hereby is affirmed. All of the above in accordance with the opinion of this court.

ATTEST:

/s/_____
Clerk

DATED: APR 18 2002

Supreme Court, U.S.
FILED
AUG 26 2005
OFFICE OF THE CLERK

(2)

No. 04-1736

In the Supreme Court of the United States

DAN ENRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioner relief under 28 U.S.C. 2255 on his claim that he received ineffective assistance of counsel.

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-20a) is reported at 347 F. Supp. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2005. The petition for a writ of certiorari was filed on June 22, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of one count of conspiring to defraud the United

States and to commit tax evasion, 26 U.S.C. 7201, wire fraud, 18 U.S.C. 1343, and money laundering, 18 U.S.C. 1957, in violation of 18 U.S.C. 371; fourteen counts of attempting to evade federal motor fuel excise taxes, in violation of 26 U.S.C. 7201; eleven counts of wire fraud, in violation of 18 U.S.C. 1343; eleven counts of money laundering, in violation of 18 U.S.C. 1957; and one count of evading currency reporting requirements, in violation of 31 U.S.C. 5316 and 5322. Petitioner was sentenced to 200 months of imprisonment and was ordered to pay $1 million in restitution. Pet. App. 4a-5a. The court of appeals affirmed, 46 Fed. Appx. 66 (3d Cir. 2002), and this Court denied certiorari, 537 U.S. 1044 (2002).

Petitioner then sought relief under 28 U.S.C. 2255. The district court denied petitioner's motion under Section 2255, Pet. App. 3a-20a, and the court of appeals denied a certificate of appealability, *id.* at 1a-2a.

1. Petitioner and his co-conspirators participated in a "daisy chain" scheme to evade over $132 million in federal excise taxes on the sale of certain kinds of fuel, including diesel fuel and gasoline. Before and during the execution of the scheme, Enright was president of PetroPlus Oil (PetroPlus), a company that bought and sold motor fuel. Petitioner and his co-conspirators made it appear as if excise taxes owed on motor fuel bought by PetroPlus had been paid by other entities. Neither those entities nor PetroPlus, however, in fact paid the taxes. Pet. App. 5a; Gov't C.A. Br. 3, 6-18.[1]

a. During the prosecution period, 1989 through 1995, the Internal Revenue Code imposed a tax on "the sale of any taxable fuel by the producer or the importer thereof

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[1] "Gov't C.A. Br." refers to the government's brief in petitioner's direct appeal from his conviction, No. 99-5111 (3d Cir.).

or by any producer of a taxable fuel." 26 U.S.C. 4091(a) (1988). "Taxable fuel" included diesel fuel. 26 U.S.C. 4092(a)(1)(A) and (2) (1988). Diesel fuel is "number two oil," which can be used both as motor fuel and as home heating oil. From 1989 to 1995, neither the federal government nor the State of New Jersey imposed an excise tax on the sale of number two oil used as home heating oil. On taxable sales of motor fuel, the federal excise tax rate ranged from 15 cents to 20.1 cents per gallon. The State of New Jersey, during a part of the prosecution period, imposed an additional excise tax and a gross receipts tax on taxable sales of number two oil. Gov't C.A. Br. 4.

Under the motor fuels excise tax system, wholesale fuel distributors holding valid Internal Revenue Service Registrations for Tax-Free Transactions (Form 637) were permitted to make tax-free sales to and tax-free purchases from other Form 637 holders. The last wholesaler in the distribution chain with a Form 637 was responsible for the payment of the excise tax. Pet. App. 5a.

b. Petitioner and his co-conspirators established a series of false middlemen and sham transactions to make it appear as if PetroPlus was purchasing fuel with the taxes included in the sales price. In reality, PetroPlus purchased fuel directly from Kings Motor Oils (Kings) without the taxes being paid by either company. Kings, a Form 637 holder, made paper sales to middle companies without taxes being paid. Some of those companies were legitimate businesses with valid Forms 637, and others were mere shell companies. The false transactions often went through several layers of middle companies in order to obscure which company was responsible for payment of the taxes. One shell company (the

"burn" company) was always positioned between Kings and PetroPlus, and any sales before that company in the chain were invoiced as tax-unpaid, while any sales after it (including to PetroPlus) were invoiced as tax-paid. Kings and PetroPlus thereby remained several degrees removed from the sale that, on paper, triggered the obligation to pay taxes. Pet. App. 5a.

Petitioner and his co-conspirators concealed their scheme through elaborate measures. They used cellular phones purchased and activated in the names of other companies, they prepared false invoices, they made payments for the fuel through sham companies, and they incorporated into the "daisy chain" sham satellite offices of legitimate fuel suppliers as well as at least eight shell companies holding invalid or stolen Form 637s. Pet. App. 6a.

2. a. Before trial, petitioner was represented by Creed Black and Peter Bennett. Bennett's firm represented petitioner at trial. Pet. App. 6a.

Petitioner's defense sought to create reasonable doubt concerning whether PetroPlus in fact was the taxpayer and whether petitioner had acted willfully. With respect to the issue of willfulness, petitioner asserted that he did not know PetroPlus was the taxpayer. Petitioner's counsel, Bennett, repeatedly and unsuccessfully argued that the government was required to prove that petitioner knew that PetroPlus was the company responsible for paying the excise taxes. Bennett proposed jury instructions to that effect. The trial culminated with petitioner's admission, on the stand, that he knew that the excise taxes were not being paid for the fuel purchased by PetroPlus. Pet. App. 6a-7a.

b. The court of appeals affirmed. *United States* v. *Enright*, 46 Fed. Appx. 66 (3d Cir.), cert. denied, 537

U.S. 1044 (2002). Petitioner was represented by new counsel (his current counsel) on appeal. Petitioner renewed his contention that he could not be convicted unless he knew PetroPlus was required to pay the excise taxes at issue. In rejecting petitioner's argument, the court of appeals explained that, "what the government had to prove was that PetroPlus was the taxpayer, not that [petitioner] knew that PetroPlus was the taxpayer." *Id.* at 70. As a result, the court reasoned, a "belief that someone other than PetroPlus owed the taxes did not constitute a defense to the crimes charged in the superseding indictment." *Ibid.* The court observed that petitioner "testified that he knew the taxes had not been payed," and the court found "ample evidence in the record from which a reasonable jury could infer that [petitioner] acted willfully to evade the taxes." *Id.* at 71.

3. On November 26, 2003, petitioner filed a motion in the district court under 28 U.S.C. 2255, alleging that he had received ineffective assistance of counsel. Petitioner contended that trial counsel, Bennett, had wrongly advised him concerning what the government was required to prove in order to establish that petitioner had acted "willfully" in evading the payment of taxes. According to petitioner, counsel had erroneously advised him that the "willfulness" standard required the government to prove that he knew that PetroPlus was responsible for the payment of excise taxes on its purchases, a legal position that had been rejected by the court of appeals. Petitioner alleged that, as a result of Bennett's erroneous advice, petitioner had rejected a plea overture from the government. Pet. App. 9a-10a.

4. The district court denied petitioner's Section 2255 motion. Pet. App. 3a-20a.

a. The court first determined that petitioner was not prejudiced by Bennett's alleged misunderstanding of the willfulness requirement. Pet. App. 12a-15a. The court explained that, to establish prejudice, petitioner was required to show that the government had extended a plea offer and that there is a reasonable probability that petitioner would have accepted the offer (and that the court would have approved the plea agreement). The court observed that it was "undisputed that there was no formal plea offer extended by the government" in this case. *Id.* at 12a. In the court's view, there would have been a "closer question if the plea discussions had advanced to a more formal stage, yet still short of a written offer." *Id.* at 13a. But the brief and informal telephone exchange between the prosecutor and petitioner's counsel—in which counsel had asked the prosecutor to give a sentencing range for a possible plea agreement but there was no discussion of the charges to which petitioner would plead guilty—"was no more than perfunctory." *Ibid.*

The court further explained that, "[e]ven if a formal plea offer had been made," petitioner "cannot demonstrate that there was even a reasonable probability he would have accepted." Pet. App. 13a. The court reasoned that petitioner's defense at trial was not limited to an argument that he lacked knowledge that PetroPlus was the taxpayer, but it also consisted of a claim that PetroPlus was "not *in fact* the taxpayer." *Ibid.* The latter claim was unaffected by any erroneous advice from petitioner's trial counsel concerning the issue of willfulness. *Ibid.*

In addition, the district court explained, there was "ample evidence from which the jury could *infer* that [petitioner] knew that PetroPlus was the taxpayer."

Pet. App. 14a. In "light of the overwhelming evidence against" petitioner, the court concluded that petitioner's "suggestion that his decision whether to pursue a plea bargain was determined by counsel's mischaracterization of the government's burden and his personal belief that he did not know that PetroPlus was the taxpayer is not credible." *Ibid.* The court explained that petitioner "offered nothing more than a statement that he would have pled guilty," and that he was required to support his claim with "more than a bare allegation." *Ibid.*[2]

b. The district court also determined that petitioner had failed to demonstrate that his trial counsel's performance was deficient. Pet. App. 15a-20a. According to the court, petitioner's "suggestion that he believed that the government needed to prove he knew that PetroPlus was the taxpayer as a result of advice he received from Bennett is simply not credible." *Id.* at 16a. The court explained that petitioner was concerned with the issue of willfulness before his indictment and trial, and that, "[i]nstead of seeking a legal opinion as to the dictates of the law, [petitioner] pushed his lawyers to craft their interpretation of the law to suit his needs." *Id.* at 18a. In addition, petitioner had consulted with lawyers, the IRS, and the State of New Jersey's "equivalent agency in his attempts to provide cover for his position," indicating "that he knew or was advised about the fine line of the law on the issue of willfulness." *Id.* at 17a.

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[2] The district court also observed that petitioner "still does not accept or acknowledge the significant evidence of his involvement in a conspiracy to evade taxes," and that the court could not have accepted a plea agreement without a sufficient allocution to the facts alleged in the indictment. Pet. App. 15a.

The court determined that, in light of its "doubts regarding [petitioner's] account of the advice given him by Bennett," the court could not "conclude that Bennett's performance was deficient." Pet. App. 18a. The court observed that the "suggestion that Bennett provided erroneous legal advice is contradicted by the evidence that [petitioner] himself dictated legal strategy to his lawyers * * * well before Bennett became involved with his case." *Ibid.* The court explained that "Bennett's overall performance throughout the trial illustrates that he was not ill-informed nor did he misunderstand the applicable law." *Id.* at 19a. The court found that petitioner's allegations were "not enough to overcome the presumption of reasonableness accorded counsel by" *Strickland* v. *Washington*, 466 U.S. 668 (1984).

5. The court of appeals denied petitioner a certificate of appealability, concluding that petitioner had failed to make a substantial showing of the denial of a constitutional right. Pet. App. 1a-2a; see 28 U.S.C. 2253(c)(2).

ARGUMENT

Petitioner argues (Pet. 13-16) that the district court erred in denying his claim of ineffective assistance of counsel. That fact-bound contention lacks merit and does not warrant review.

1. The district court determined (Pet. App. 12a-15a) that petitioner had failed to demonstrate that he was prejudiced by his counsel's allegedly erroneous advice. The court explained that, to establish prejudice, petitioner was required to demonstrate that the government extended a plea offer and that there is a reasonable probability that he would have accepted the offer. *Id.* at